Office - Supreme Court, U.S.
FILED
MAR 9 1984
ALEXANDER L. STEVAS
CLERK

No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF PETITIONER

JOHN E. SHOOP, *Prosecuting Attorney of Lake County, Ohio*
Counsel of Record
JUDSON J. HAWKINS
ROBERT W. LAFORCE
JOSEPH M. GURLEY
FRANCIS P. WEISS
Assistant Prosecuting Attorneys
47 North Park Place
P.O. Box 490
Painesville, Ohio 44077
(216) 357-2683
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED FOR REVIEW

I. Whether the double jeopardy clause of the United States Constitution prohibits the continued prosecution of a criminal defendant, charged in a single, multiple count indictment containing arguably greater and lesser included offenses, where that defendant persuades the trial court to honor his election to plead guilty to the lesser offenses over the state's objections.

II. Whether the double jeopardy protections of the United States Constitution prohibit the continued prosecution of a defendant charged in a single, multiple count indictment of arguably greater and lesser included offenses, where the defendant persuades the trial court prior to trial, to accept his guilty pleas to the lesser counts of the indictment, where the state criminal code provides for crediting time served, concurrent sentencing and vacation of earlier judgments of conviction.

III. Whether murder as defined in Ohio Revised Code Section 2903.02 and Involuntary Manslaughter as defined in Ohio Revised Code Section 2903.04 are the same offenses for purposes of the double jeopardy provision precluding multiple punishments for both those offenses.

TABLE OF CONTENTS

Questions for Review I
Table of Authorities III
Opinions of the Court Below 1
Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked 2
Constitutional and Statutory Provision Which the Case Involved 2
Statement of the Case 3
Summary of Argument 6

First Argument:

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution Was Not Intended as a Bar to Further Prosecution in All Cases in Which a Verdict Has Been Rendered. Unless There Has Been a Verdict of Acquittal or Its Equivalent, the Question of When Double Jeopardy Bars Further Prosecution Must Be Decided by Weighing and Balancing the Intended Prosecutions of the Provision Against the Rights and Interests of the State. There Are Exceptions Which Permit Further Prosecution Even After a Verdict of Guilty Has Been Returned 8

Second Argument:

Application of the Double Jeopardy Clause and State Criminal Code Provisions in Any Single Criminal Proceeding Containing a Multiple Count Indictment of Greater and Lesser Included Offenses Precludes Only the Imposition of Consecutive or Cumulative Sentences for Both Offenses. The

Court Below Erred in Holding That the Constitution Bars Continuation of a Single Proceeding to Trial on the Greater Offenses, Where the Defendant Has Persuaded the Trial Court to Honor His Election to Plead Guilty to the Lesser Offenses Over the State's Objection 25

Third Argument:

Murder as Defined in Ohio Revised Code Section 2903.02 and Involuntary Manslaughter as Defined in Ohio Revised Code Section 2903.04 Are Not the Same Offenses for Purposes of Double Jeopardy Protections Where Both Statutes Contain Different Elements and Convictions for Either Offense Would Require Proof of Facts Not Necessary to Sustain Conviction on the Other 33

Conclusion 38

Appendix:

Ohio Rules of Criminal Procedure, Rule 11 ..... A1

Ohio Revised Code:

§ 2939.06 ..... A5
§ 2939.08 ..... A5
§ 2941.25 ..... A5

Ohio Constitution, Article I, Section 10 ..... A6
Mentor-on-the-Lake Ordinance, Section 672.12 ..... A7

TABLE OF AUTHORITIES

Cases

Albernaz v. United States, 450 U.S. 333 (1981) 34
Arizona v. Washington, 434 U.S. 497 (1978) 13, 18, 19, 20
Beavers v. Henkel, 194 U.S. 73 (1904) 8
Bell v. United States, 349 U.S. 81 (1955) 29
Blockburger v. United States, 284 U.S. 299 (1932) ....*passim*
Brown v. Ohio, 432 U.S. 161 (1977) 28, 29, 35
Burks v. United States, 437 U.S. 1 (1978) 15
City of Maumee v. Geiger, 45 Ohio St. 2d 238, 344 N.E. 2d 133 (1976) 10
Ex Parte Lange, 85 U.S. 163 (1874) 27, 28, 31
Green v. United States, 355 U.S. 184 (1957) 15, 22, 27
Gore v. United States, 357 U.S. 386 (1958) 29
Hurtado v. California, 110 U.S. 516 (1884) 8
Iannelli v. United States, 420 U.S. 770 (1975) 24, 34
Illinois v. Somerville, 410 U.S. 458 (1973) 13, 14
Illinois v. Vitale, 447 U.S. 410 (1980) 36
Jeffers v. United States, 432 U.S. 137 (1977) 22, 23, 24, 30, 31
Lee v. United States, 432 U.S. 23 (1977) 18
Lem Woon v. Oregon, 229 U.S. 586 (1913) 8
Levine v. United States, 362 U.S. 610 (1960) 8
Missouri v. Hunter, 74 L. Ed. 2d 535 (1983) 34
North Carolina v. Pearce, 395 U.S. 711 (1969) 26, 27, 31, 32
Serfass v. United States, 420 U.S. 377 (1975) 17
Singer v. United States, 380 U.S. 24 (1965) 13
State ex rel. Doerfler v. Price, 101 Ohio St. 50, 128 N.E. 173 (1920) 9

State v. Logan, 60 Ohio St. 2d 126, 397 N.E.2d 1345 (1979) 35, 36
State v. Osborne, 49 Ohio St. 2d 135, 359 N.E.2d 78 (1976) 10
State v. Weind, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977) 10
United States v. Ball, 163 U.S. 662 (1896) 14, 18
United States v. DiFrancesco, 449 U.S. 117 (1980) 28
United States v. Dinitz, 424 U.S. 600 (1976) 18
United States v. Jenkins, 420 U.S. 358 (1975) 21, 22
United States v. Jorn, 400 U.S. 470 (1971) 16
United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 14, 15
United States v. Perez, 22 U.S. 579 (1824) 17, 18
United States v. Scott, 437 U.S. 82 (1978) 20, 21, 22
United States v. Wilson, 420 U.S. 332 (1975) 16
Wade v. Hunter, 336 U.S. 684 (1949) 14, 15, 18, 19, 20
Whalen v. United States, 445 U.S. 684 (1980) 27

Other Authorities

BLACK'S LAW DICTIONARY, 276, 343 (5th ed. 1979) 32

Constitution, Statutes, Rules and Ordinance

United States Constitution:

Amendment 5 ..... 2, 8, 12, 13, 17, 25, 32, 35, 39
Amendment 14, § 1 ..... 2, 8
Ohio Constitution, Article I, Section 10 ..... 3, 8

Ohio Revised Code:

§ 2903.02(A)(B) 2, 4, 33
§ 2903.04(B)(C) 2, 4, 33
§ 2911.01(A)(B) 2, 4
§ 2913.02(A)(B) 2, 4
§ 2929.41(A)(B) 2
§ 2939.06 ..... 3, 9
§ 2939.08 ..... 3, 9
§ 2941.25 ..... 3, 5, 9, 10, 35
§ 2953.21(A)(G) 2, 32
§ 2967.191 ..... 2, 32

Ohio Rules of Criminal Procedure, Rule 11 ..... 3, 11
Mentor-on-the-Lake, Ohio, Codified Ordinance Section 672.12 ..... 3, 37

No. 83-904

In the Supreme Court of the United States

October Term, 1983

THE STATE OF OHIO,
Petitioner,

vs.

KENNETH M. JOHNSON,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF PETITIONER

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS OF THE COURT BELOW

The Official Report of the Opinion by the Supreme Court of Ohio affirming the judgment of the Ohio Court of Appeals for the Eleventh District. Petition for Writ of Certiorari, Appendix at p. A1.

The Judgment Entry and Opinion of the Ohio Court of Appeals for the Eleventh District affirming the judgment of the Court of Common Pleas, Lake County, Ohio. Petition for Writ of Certiorari, Appendix at p. A14.

The Judgment Entry and Opinion of the Court of Common Pleas, Lake County, Ohio, granting the Defendant's Motion to Dismiss the charges of Murder and Aggravated Robbery. Petition for Writ of Certiorari, Appendix at p. A21.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on August 31, 1983. No Motion for Rehearing was filed. The jurisdiction of this Court is invoked under Title 28, United States Code Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVED

The relevant constitutional and statutory provisions involved herein are set forth in Petitioner's Writ for Certiorari Appendix at p. A26.

(5th Amendment) of the United States Constitution

(14th Amendment) of the United States Constitution

Article I, Section 10 of the Constitution of Ohio

Ohio Revised Code, Section 2903.02(A)(B) Murder

Ohio Revised Code, Section 2903.04(B)(C) Involuntary Manslaughter

Ohio Revised Code, Section 2911.01(A)(B) Aggravated Robbery

Ohio Revised Code, Section 2913.02(A)(B) Theft

Ohio Revised Code, Section 2929.41(A)(B) Multiple Sentences

Ohio Revised Code, Section 2953.21(A)(G) Petition to Vacate or Set Aside Sentence

Ohio Revised Code, Section 2967.191 Reduction of Minimum and Maximum Sentence

Ohio Revised Code, Section 2939.06 Oath to Grand Jury (Brief Appendix p. A5)

Ohio Revised Code, Section 2939.08 Duty of Grand Jury (Brief Appendix p. A5)

Ohio Revised Code, Section 2941.25 Multiple Counts (Brief Appendix pp. A5-A6)

Ohio Rules of Criminal Procedure, Rule 11 (Brief Appendix pp. A1-A4)

Mentor-on-the-Lake, Ohio, Codified Ordinance Section 672.12 Discharge of a Firearm within the City Limits (Brief Appendix p. A6)

STATEMENT OF THE CASE

In the early morning hours of January 25th, 1979, Thomas Hill was shot to death at his apartment in the City of Mentor-on-the-Lake, Lake County, Ohio. At the time of the killing of Thomas Hill several items of his personal property were stolen from his apartment.

The Defendant-Respondent and two Co-Defendants were arrested in connection with the slaying less than twelve hours later. A preliminary hearing was held within five days of those arrests in the Mentor Municipal Court, and due to a City Prosecutor's error, all charges were dismissed against the Defendant-Respondent and his bond was released.

On February 13, 1979, the Lake County Grand Jury found that probable cause existed to believe that the Defendant-Respondent had violated four separate criminal statutes, and the Grand Jury returned a single Secret Indictment charging the Defendant-Respondent with one count of Murder in violation of Ohio Revised Code Sec-

tion 2903.02(A), one count of Involuntary Manslaughter in violation of Ohio Revised Code Section 2903.04(B), one count of Aggravated Robbery in violation of Ohio Revised Code Section 2911.01(A)(1), and one count of Grand Theft in violation of Ohio Revised Code Section 2913.02(A)(1) (See Petition for Writ of Certiorari, Appendix at pp. A26-A27), in Case No. 79-CR-048 (See Joint Appendix at pp. 2-3).

Prior to the action of the Grand Jury the Defendant-Respondent absented himself from the jurisdiction of Lake County, and it was not until nearly two years after Thomas Hill's death that he was arrested in the State of Tennessee. Upon his apprehension and return to Ohio, the Defendant-Respondent was brought before a Lake County Common Pleas Judge for purposes of arraignment on October 9, 1980. At that hearing the Defendant-Respondent proffered "Guilty" pleas to the charges of Involuntary Manslaughter and Grand Theft and "Not Guilty" pleas to the charges of Murder and Aggravated Robbery. The State of Ohio objected to the proffer of the guilty pleas (Joint Appendix, p. 5, Transcript of Proceedings, October 9, 1980), and the arraigning judge reserved ruling on whether or not he was obligated to accept the pleas (Joint Appendix, pp. 9-10, Transcript of Proceedings, October 9, 1980). Bond was set in the matter, and the case was subsequently assigned to the trial court. The trial court was faced with the issue of whether or not it should accept the proffered guilty pleas to the lesser offenses.

Following written arguments by both sides and over the vehement objections of the State of Ohio (Record, Transcript of Proceedings, November 26, 1980, pp. 4-9), the Defendant-Respondent, at a hearing on November 26, 1980, persuaded the trial court to exercise its discretion in favor of accepting his guilty pleas to the lesser indicted offenses

of Involuntary Manslaughter and Grand Theft (Record, Transcript of Proceedings, November 26, 1980, p. 38). The Court then sentenced Defendant-Respondent to three to ten years on the Involuntary Manslaughter count and two to five years on the Grand Theft count with those sentences to run consecutively (See Joint Appendix at pp. 20-21).

Following those pleas the Defendant-Respondent moved to dismiss the remaining counts of Murder and Grand Theft on Double Jeopardy grounds arguing that continued prosecution amounted to multiple prosecutions for the same offense and also invoking the doctrine of collateral estoppel. The trial court granted the Motion to Dismiss following briefs and arguments (Record, Transcript of Proceedings, January 26, 1981) in its Judgment Entry and Opinion of March 31, 1981 (See Petition for Writ of Certiorari, Appendix at p. A21).

Thereupon the State of Ohio filed an appeal of the trial court's dismissal of the remaining counts with the Court of Appeals of Ohio, Eleventh District, Lake County, Case No. 8-221. The State Court of Appeals, in its Judgment Entry and Opinion of April 1, 1982, affirmed the trial court's dismissal of the counts in the indictment charging Murder and Aggravated Robbery (See Petition for Writ of Certiorari, Appendix at p. A14).

The Supreme Court of Ohio affirmed the decision of the Court of Appeals on August 31, 1983, in Case No. 82-657, and found that Aggravated Robbery and Grand Theft were allied offenses of similar import pursuant to Ohio Revised Code Section 2941.25(A) and that since Murder and Involuntary Manslaughter share the common element of causing the death of another and are distinguishable only by the defendant's mental state, the defendant, in any single killing could only be convicted of one offense or the other but not both. In so finding the Court held that

in this case the Double Jeopardy provision prohibiting multiple punishments for the same offense would be violated by further prosecution of the Defendant-Respondent (See Petition for Writ of Certiorari, Appendix at p. A1).

SUMMARY OF ARGUMENT

The opinion adopted by the Ohio Supreme Court, although limited in scope, is broad in its effect. Its holding that the acceptance of pre-trial guilty pleas, at a defendant's behest, of lesser indicted offenses prohibits prosecution on the greater indicted offenses has completely terminated the rights of one litigant—the people of Ohio—in a criminal proceeding. In this respect it is also a broad departure from previous criminal proceedings. Prior to the Ohio Supreme Court's decision, judicial interference with the State's criminal proceeding, i.e., the suppression of evidence or dismissal of charges, was based upon some impropriety or misconduct by the State. In the case at bar, however, the State of Ohio has not acted improperly, and in no instance has it been so accused.

The Lake County Grand Jury has found that probable cause existed to believe that the Defendant-Respondent violated four distinct criminal statutes, and thus returned an indictment on multiple counts. There clearly has been no deprivation of any Constitutionally guaranteed rights of the Defendant-Respondent by returning such an indictment. Further, the State has vigorously opposed the trial court's acceptance of the Defendant-Respondent's plea of guilty to the crimes of his choice. Surely this is not so great an impropriety as to call for the deprivation of the State's rights to one full and complete proceeding.

Where the State has acted properly and there has been no verdict equivalent to an acquittal, the interests of the State must be weighed and balanced against the pro-

tections of the Double Jeopardy Clause intended for the individual. Even when there has been a conviction, the Double Jeopardy Clause is not a complete bar to further prosecution in all cases. There are exceptions to its protections, especially where an accused voluntarily decides to terminate the proceedings prior to a full and complete hearing in an effort to avoid the full penalty for his criminal conduct.

Further, no violation of the Double Jeopardy protections occurs when all of the charges are brought in one proceeding and cumulative sentences can be avoided by judicial order or pursuant to State statutes. The Defendant-Respondent can, in this case, be tried and convicted for Murder and Aggravated Robbery, and any sentence which does not exceed the maximum allowable for those offenses will not subject the Defendant-Respondent to multiple punishment. The most that may be required is that the Defendant-Respondent receive credit for time served on the lesser offenses.

In addition, double jeopardy is not applicable to Murder and Involuntary Manslaughter. The fact that an offense may, in some instances, be proved while proving the greater offense does not mean that double jeopardy prohibits further prosecution. Pursuant to *Blockburger v. United States*, 284 U.S. 299 (1932), before double jeopardy prohibits further prosecution, the elements of the two offenses must correspond to such a degree that the facts necessary to prove one will, as a matter of course, prove the other. That is not the case with these two Ohio homicide charges.

ARGUMENT

I. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution Does Not Prohibit Continued Prosecution in a Multi-Count Indictment When the Defendant Persuades the Trial Court, Over the Objections of the State, to Accept Pleas of Guilty to the Less Severe Charges. Unless There Has Been a Verdict of Acquittal or Its Equivalent, the Question of When Double Jeopardy Bars Further Prosecution Must Be Decided by Weighing and Balancing the Intended Projections of the Provision Against the Rights and Interests of the State.

The Grand Jury in the United States and Ohio has long been recognized as an inquisitorial body whose object is the detection and punishment of crime. *Beavers v. Henkel*, 194 U.S. 73 (1904); *Levine v. United States*, 362 U.S. 610 (1960). Initially established in England as a device to accuse and try wrongdoers, it eventually evolved a further purpose as a barrier against royal persecution. When adopted in this country, the Grand Jury's duty surfaced as a dual role of bringing wrongdoers to justice while serving as a protection against unfounded and unreal accusations. *Hurtado v. California*, 110 U.S. 516 (1884).

Although the "due process" clause of the Fourteenth Amendment does not make the Fifth Amendment Grand Jury requirement applicable to the states,[1] Article I, Section 10 of the Constitution of the State of Ohio sets forth the establishment of the Grand Jury within Ohio.[2]

---

1. See, e.g. *Lem Woon v. Oregon*, 229 U.S. 586 (1913)

2. *Article I, Section 10, Ohio Constitution*: "Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger,

(Continued on following page)

Refinement of the responsibilities of Ohio Grand Juries are statutorily set forth in Section 2939.06 and 2939.08 of the Ohio Revised Code (Brief Appendix at A5). Pursuant to said sections, it is the duty of each Grand Jury member to "diligently inquire, and true presentment make" of all matters and things presented.[3] Further, it is the duty of the Grand Jury as a whole to "proceed to inquire of and present all offenses committed within the county" where they are situated.[4]

This statutory authority coincides with the generally recognized principle in Ohio that the Grand Jury powers of investigation and authority to make general findings are comparatively without limit. *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 128 N.E. 173 (1920).

A consistently repeated dilemma facing Grand Juries is what to do when there is probable cause to support more than one theory as to how a defendant committed an offense, and each theory may dictate a different charge. Adhering to the concept of broad Grand Jury indictment authority, the Ohio General Assembly has adopted legislation that alleviates the aforementioned predicament. Ohio Revised Code Section 2941.25 (A) provides:

> "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain

---

Footnote continued—

and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. . ."

3. *Ohio Revised Code Section 2939.06*

4. *Ohio Revised Code Section 2939.08*

counts for all such offenses, but the defendant may be convicted of only one."

Thus, if evidence is presented to the Grand Jury which establishes probable cause concerning two or more theories as to how a defendant committed an offense, the Grand Jury is free to indict on the varying charges stemming from the different theories.

When such an indictment is presented by the Grand Jury, the burden as to the election of which charge is to be pursued lies with the State. Such election does not have to be made until after the defendant has been tried on the two or more charges. The courts in Ohio have recognized that it was the Ohio General Assembly's intent to leave the issue of election solely to the prosecution, and that said election could be made at any time, including after the jury has returned a verdict, so long as the election was prior to conviction and sentencing. See, e.g., *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 344 N.E. 133 (1976); *State v. Osborne*, 49 Ohio St. 2d 135, 359 N.E.2d 78 (1976); *State v. Weind*, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977).[5]

---

5. The Ohio cases cited support the concept enunciated by the Ohio Supreme Court in *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 344 N.E.2d 133 (1976), when, in dealing with one indictment charging both Grand Theft and Receiving Stolen Property arising out of the same transaction, the court stated the following: "This case does not involve common law distinctions or constitutional principles, but statutory construction and intent. Accordingly, the intent of the General Assembly controls in this case, and that intent is plainly expressed in Ohio Revised Code Section 2941.25, *supra*, and the accompanying committee comment. Although 'receiving' is technically not an included offense of theft, it is, under Ohio Revised Code Section 2941.25, an 'allied offense of similar import.' An accused may be tried for both but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense." *City of Maumee v. Geiger*, 45 Ohio St. 2d at 244 (1976).

In the instant case, the Lake County, Ohio, Grand Jury was presented with the facts surrounding the shooting death of Thomas Hill. After the presentation of evidence, the Grand Jury, pursuant to its statutory authority, indicted the Appellee herein for the offenses of Murder and Involuntary Manslaughter, as well as Aggravated Robbery and Grand Theft. The homicide offenses, arguably considered to be allied and of similar import, were based upon different theories of how the Appellee committed the same act. After said indictment was presented, it was up to the prosecutor, and the prosecutor only, to determine which count would be pursued to conviction and sentencing. This is entirely proper since the State, like any litigant, ought to be entitled to have a trier of fact determine which theory is correct. When the Defendant-Respondent herein intervened by attempting to enter a plea of Guilty to the charge of Involuntary Manslaughter, he was improperly circumventing the authority the Ohio General Assembly had granted to the State in the prosecution of offenses. Since the trial court was not obligated to accept Defendant's plea pursuant to Ohio Rules of Criminal Procedure, Rule 11(C)(2) (Brief Appendix at A2), the trial court's acceptance of Defendant-Respondent's plea was erroneous. The trial court also erroneously found that double jeopardy precluded the State from pursuing the properly indicted Murder and Aggravated Robbery charges against the Defendant-Respondent. Since the Grand Jury acted properly in issuing the indictment herein, and since the State had the right to determine which charge it would pursue to conviction and sentencing, and because double jeopardy does not mandate otherwise, the decision of the trial court was erroneous.

The State of Ohio has obviously acted in a manner consistent with the Constitution of the United States and

the State of Ohio. Having done so the people of Ohio should have been able to expect at least one full and complete opportunity to present the facts and issues of their lawsuit to a trier of fact. Any litigant in any lawsuit in the United States could expect no less from a court. Prior to this case in the area of criminal proceedings, only when the State has acted improperly have its lawsuits been scrutinized or inhibited, i.e., by the suppression of certain evidence or the dismissal of charges. In the case at bar, however, a court of law has completely terminated the State's rights to proceed to one full and complete trial and present evidence and place at issue the facts and the law. Surely this was not the intended purpose of the Double Jeopardy provision of the Fifth Amendment.

Indeed, since the State of Ohio has acted properly and in full faith and compliance with the laws, its rights in this litigation must be recognized and protected. If the Defendant-Respondent's concept of the Double Jeopardy Clause is correct, then an accused has—with the acquiescence of the trial judge—plenary powers over the disposition of the opposing litigant's presentation of the facts. The accused can effectually terminate a major portion of the criminal proceedings against him, or inhibit the Grand Jury's executive powers.

Prior to the Ohio Supreme Court's decision, no defendant has ever been permitted the privilege of so complete a suppression of the public's interest. It has long been recognized that the Government has valid interests in a complete presentation of its cases to a tribunal.

> "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the Tribunal which the

Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24 at 36 (1965).[6]

This recognition of the people's rights to fully participate in at least one full and complete criminal proceeding has been consistently echoed in a variety of situations.

In *Arizona v. Washington*, 434 U.S. 497 (1978) this Court stated "as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. at 505.

Similarly, in *Illinois v. Somerville*, 410 U.S. 458 (1973), this Court again considered the public's rights or interests in relation to an accused's protections pursuant to the Fifth Amendment's Double Jeopardy Clause. The trial court, in *Somerville*, had declared a mistrial over the defendant's objections, and the defendant argued that, since jeopardy had attached when the jury was impaneled and sworn, a second trial constituted double jeopardy. This Court disagreed, finding that the trial court's action was proper, and ruled the following concerning the public's interest:

"The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude

---

6. It is pertinent to note that the issues presented to the United States Supreme Court in *Singer* involved an accused who attempted to waive a jury trial over the objections of the Government's attorney. This court ruled, "We can find no evidence that the common law recognized that defendants had the right to choose between court and jury trial." *Singer v. United States*, 380 U.S. at 26. Furthermore, the Defendant-Respondent has not presented any authority which indicates that under the common law defendants had the right to avoid trial altogether by pleading guilty.

> the vindication of that interest. This consideration, whether termed the 'ends of public justice . . ., or, more precisely, the public's interest in fair trials designed to end in just judgments' . . ., has not been disregarded by this court." *Illinois v. Somerville*, 410 U.S. at 463.

The above-cited case can, obviously, be factually distinguished from the case at bar. In *Somerville*, there had been no verdict, either of acquittal or conviction. In the case at bar, the defendant has plead guilty and been convicted of two crimes. Despite this factual distincton, the above-cited case establishes and supports the principle that the people of Ohio are litigants in a legal proceeding, and, as such, they have rights and expectations which must be weighed and considered before a court can dismiss a criminal charge on the basis of double jeopardy. The rights and expectations of the people must, generally speaking, be weighed and considered in relation to the constitutionally protected rights of the Defendant-Respondent, although there is a situation in which the people are absolutely barred from continuing a prosecution, i.e., where the defendant has received a verdict equivalent to an acquittal. *United States v. Ball*, 163 U.S. 662, 671 (1896).

Barring an acquittal or conviction after a complete trial, the Double Jeopardy Clause was not intended to shield an accused from a legitimate criminal prosecution of the State. The Double Jeopardy prohibitions are aimed at "oppressive practices" by the State. *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

This concept was echoed and more completely discussed in *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) where this Court ruled that "at the heart of this policy [double jeopardy provision] is the concern that permitting the sovereign freely to subject the citizen to a

second trial for the same offense would arm Government with a potent instrument of oppression." *United States v. Martin Linen Supply Co.*, 430 U.S. at 569.

In addition to restricting State misconduct, it has a further and related purpose of sparing the accused the emotional and financial ordeal of being subjected to multiple trials:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazard of trial and possible conviction more than once for an alleged offense. . .
>
> The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187, 188 (1957).

Significant in its absence is any mention that the State is prohibited from prosecuting at least one full and complete criminal proceeding.

The Double Jeopardy provision has, in addition to and related to those purposes cited in *Green* and *Hunter*, another concern that is "central to the objective of the provision". That is that the State should not have a second opportunity to muster evidence which it failed to present at the first proceeding. *Burks v. United States*, 437 U.S. 1, 11 (1978).

The provision's broad motivating force is to assure that "principles of fairness and finality" be imposed on criminal proceedings in the United States. *United States v. Wilson*, 420 U.S. 332, 343 (1975).

The Defendant-Respondent in the case at bar is requesting finality, but he is not asking for fairness. He is, in fact, demanding quite the opposite. The Defendant-Respondent is seeking to impose a highly restrictive and rigid rule on the courts of Ohio, and thereby avoid the full consequences of his criminal acts. Deeply disturbing is the absence of any objectively practical or humane gains which this rule would bring to this area of law. The Defendant-Respondent, of course, would highly benefit from the adoption of such a rule, but his interpretation of the Double Jeopardy Clause would mandate that the State's expectations of equity and fairness be denied and that the State not be allowed to have one complete and lawful opportunity to present its case to a trier of fact. There is no case law that supports such an inequitable proposition. Quite the contrary, the case law strongly mandates that the State be allowed at least one opportunity to present its case; in addition to the previously cited cases is the following:

> ". . . [S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal law." *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Can this "very vital interest" of the State be vindicated in a proceeding in which the accused is permitted to persuade the trial court, over the State's objections, to accept pleas of guilty to the crimes of his choice? Surely

the Double Jeopardy provision of the Fifth Amendment was not intended to extend this type of luxury to a criminal defendant.

It is in light of the expectations and rights of the public and the intended purpose of the Double Jeopardy provision that this Court must decide whether or not the State of Ohio is barred from continuing the prosecution of this defendant. The fact that this defendant has been placed in jeopardy is not, in and of itself, determinative since "The conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Serfass v. United States,* 420 U.S. 377, 390 (1975).

The question of when the Double Jeopardy provision does bar continued prosecution is not subject to rigid standards, as first established in *United States v. Perez,* 22 U.S. 579 (1824). In that particular case the trial court had, without the consent of either defendant or Government, discharged a deadlocked jury. At the second trial the defendant claimed that double jeopardy prohibited a continued prosecution. The United States Supreme Court disagreed, ruling:

> "We think, that in all the cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. . ." *United States v. Perez,* 22 U.S. at 580.

That decision has been the basis for later decisions by the United States Supreme Court concerning issues of

double jeopardy. This Court has consistently refused to adopt any "rigid formula" to resolve such issues. *Wade v. Hunter*, 336 U.S. at 690.

The instances in which continued prosecutions have been permitted have been numerous, *United States v. Perez* being merely the first of many. A new trial is permitted following the defendant's successful appeal of his conviction, *United States v. Ball*, 163 U.S. at 672 (1896); where a mistrial has been declared from the manifest necessity caused by a military advance, *Wade v. Hunter*, 336 U.S. at 688; where the defendant has requested a mistrial in the absence of judicial or prosecutorial overreaching, *United States v. Dinitz*, 424 U.S. 600 (1976); or where an indictment is dismissed at the request of the defendant and in a situation functionally equivalent to a mistrial, *Lee v. United States*, 432 U.S. 23 (1977).

It is irrational to assume, in the light of these cases, that the Double Jeopardy provision bars a continued prosecution when all the charges against an accused are brought in one proceeding and he persuades the trial court to accept his plea of guilty to the crimes of his choice. This is conceptually inconsistent with the holdings of the cases in which continued prosecutions are permitted.

Many of these cases which permit continued prosecution utilize a weighing and balancing test. In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court dealt with a fact situation in which the defendant had been tried and convicted of murder but granted a new trial because the State had withheld exculpatory evidence from the defense. At the beginning of the second trial the defense counsel improperly alluded to the State's withholding of evidence during the first trial. The trial judge granted the State's Motion for Mistrial based upon that improper

comment. This Court, dismissing a double jeopardy argument, upheld a third trial and conviction, stating that an accused's:

> ". . . valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecution one full and fair opportunity to present his evidence to an impartial jury." *Arizona v. Washington,* 434 U.S. at 505.

The issue of a second trial after jeopardy had attached was also dealt with in *Wade v. Hunter.* In that case an American soldier in Germany was accused of rape and placed on trial before a court-martial. After evidence was presented, but before a verdict was reached, the trial was terminated. This termination was due to ever increasing distances between the court and the witnesses caused by a rapid military advance. The accused was later tried and convicted. He appealed on the grounds of double jeopardy. This Court ruled that double jeopardy did not bar the re-trial and conviction stating:

> "The double jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibition is aimed. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter,* 366 U.S. at 688, 689.

Neither *Arizona v. Washington*, nor *Wade v. Hunter* involves an adjudication of guilty by plea. Both cases, however, speak of a necessary weighing and balancing test between the constitutionally intended protection of the Double Jeopardy provision and the public's interest in a complete and just proceeding. And the decisions of the United States Supreme Court have consistently held in favor of the State when the defendant himself has voluntarily sought to terminate his trial without having his guilt or innocence submitted to either judge or jury.

In *United States v. Scott*, 437 U.S. 82 (1978), this Court dealt with a fact situation roughly similar to the case at bar. In *Scott* the defendant was charged with a three count narcotics indictment. Before, and twice during his trial, the defendant moved to dismiss two counts on the grounds that his defense had been prejudiced by pre-indictment delay. At the close of all the evidence the trial court granted the defendant's Motion. The jury returned a verdict of guilty on the third count. The Government sought to appeal the dismissed counts, and the defendant opposed this appeal, arguing that any further prosecution was barred by double jeopardy.

This Court dealt with the issue in depth, dealing first with the issue of mistrials in several different situations but ruling the following concerning *Scott*:

> "Where, . . ., a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution." *United States v. Scott*, 437 U.S. at 93.

This Court then went on to consider the relationship between the Double Jeopardy Clause and reprosecution when a defendant has successfully persuaded the trial

court to terminate part of the proceedings in his favor before any factual determination of guilt or innocence. This Court first re-evaluated its position in *United States v. Jenkins*, 420 U.S. 358 (1975),[7] and went on to adopt the following position:

> "Upon fuller consideration, we are now of the view that this language from *Green*, while entirely appropriate in the circumstances of that opinion, is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution. It is quite true that the Government . . . should not make repeated attempts to convict an individual . . . But that situation is obviously a far cry from the present case, where the Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empanelled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a picture of an all powerful State relentlessly pursuing a defendant

---

7. *United States v. Jenkins*, 420 U.S. 358 (1975), involved a defendant who was indicted on a charge of violating 50 USCS Appx § 462(a) by knowingly refusing to submit to induction into the armed forces. Jenkins had applied for a conscientious objector status the day before he was to report for induction, but was refused a postponement of his induction date. He failed to appear and he was subsequently indicted. Both before and during his bench trial, Jenkins moved to dismiss the charges against him. At the close of the evidence, the Court filed written findings of fact and conclusions of law and directed that the indictment be dismissed. The record did not, however, disclose whether there was or was not a resolution of the factual issues. This Court ruled that:

> ". . . [I]t is enough for purposes of the Double Jeopardy Clause, and therefore, for the determination of appealability under. . . That further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." *United States v. Jenkins*, 420 U.S. at 370.

It was this issue which this Court addressed in *Scott*.

who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt." *United States v. Scott*, 437 U.S. at 96.[8]

Quite simply, this Court ruled that double jeopardy "does not relieve a defendant from the consequences of his voluntary choice." *United States v. Scott*, 437 U.S. at 99. It was the Defendant-Respondent in the case at bar who voluntarily decided to enter pleas of guilty to the crimes of his choice. Unlike *Scott*, however, the Defendant-Respondent has undertaken his course of action only prior to trial and in a blatant attempt to use the Double Jeopardy provision as a shield against being fully prosecuted for his crimes.

Scott is roughly analogous to the case at bar, but *Jeffers v. United States*, 432 U.S. 137 (1977) is even more applicable. Garland Jeffers was indicted for one count of conspiring, together with nine co-defendants, to distribute heroin and cocaine. In a separate indictment he was also charged individually with conducting a "continuing crim-

---

8. This Court referred to the following quote from *Jenkins*:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make *repeated attempts* to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . *Jenkins*, supra, at 370, 43 L. Ed. 2d 250, 95 S. Ct. 1006, quoting *Green*, 355 U.S., at 187, 2 L. Ed. 2d 199, 78 S. Ct. 221, 77 Ohio L. Abs. 202, 61 ALR 2d 1119." *United States v. Scott*, 437 U.S. at 95.

inal enterprise", in concert with five or more others to distribute cocaine and heroin, and that as a result of such activity he had derived a substantial income. The Government, prior to trial, moved to consolidate these two indictments. The trial court refused to do so, however, based upon the Defendant-Respondent's objections to joinder. The defendant had argued that the statutes were dissimilar. The defendant was convicted by a jury of the first indictment, following which he moved to dismiss the second indictment on the grounds of double jeopardy. This Motion was denied by the trial judge and the defendant was again convicted. He appealed, again on the grounds of double jeopardy.

This Court upheld the second conviction without, however, reaching a majority opinion concerning the impact of the defendant's voluntary action in bifurcating his two prosecutions. Four of the Justices of this Court, however, adopted the following position:

> "If the defendant expressly asks for separate trials on the greater and the lesser offenses, or, in connection with his opposition to trial together, fails to raise the issue that one offense might be a lesser included offense of the other, another exception to the Brown rule emerges. This situation is no different from others in which a defendant enjoys protections under the Double Jeopardy Clause, but for one reason or another retrial is not barred. . . . Similarly, although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers v. United States*, 432 U.S. at 152.

These same Justices went on to hold that where a defendant "was solely responsible for the successive pros-

ecutions", his voluntary conduct "deprived him of any right that he might have had against consecutive trials." *Jeffers v. United States*, 432 U.S. at 154. The above four Justices constituted a majority because Mr. Justice White concurred on the basis that *Iannelli v. United States*, 420 U.S. 770 (1975) was controlling.

The four remaining Justices dissented and argued that double jeopardy did protect Jeffers. Their dissent, however, seems to focus on their perception of misconduct by the Government:

> "I would not permit the prosecutor to claim ignorance of this ancient rule, or to evade it by arguing that the defendant failed to advise him of its existence or its applicability.
>
> The defendant surely cannot be held responsible for the fact that two separate indictments were returned, or for the fact that the defendants were named in the earlier indictment, or for the fact that the Government elected to proceed to trial first on the lesser charge." *Jeffers v. United States*, 432 U.S. at 158, 159 (footnote deleted).

This concern with the Government's misconduct is further evidenced by footnote 2 of the above cited passage which reads:

> "The plurality implies that the result in this case would be different if any action by the Government contributed to the separate prosecutions on the lesser and greater charges. . . . I wonder how the grand jury happened to return two separate indictments." *Jeffers v. United States*, 432 U.S. at 159.

None of the facts that concerned the dissenters in *Jeffers* is present in the case at bar. In this particular instance, the State of Ohio has acted properly. Any suc-

cessive or bifurcated prosecution has been caused by the defendant's voluntary act, and when the intended purposes of the Fifth Amendment's Double Jeopardy provision are weighed and balanced against the rights and expectations of the people of Ohio, it is our contention that this fact situation—like others previously cited—constitutes an exception to the protections of the Double Jeopardy Clause.

II. Application of the Double Jeopardy Clause and State Criminal Code Provisions in Any Single Criminal Proceeding Containing a Multiple Count Indictment of Greater and Lesser Included Offenses Precludes Only the Imposition of Consecutive or Cumulative Sentences for Both Offenses. The Court Below Erred in Holding That the Constitution Bars Continuation of a Single Proceeding to Trial on the Greater Offenses, Where the Defendant Has Persuaded the Trial Court to Honor His Election to Plead Guilty to the Lesser Offenses Over the State's Objection.

The Supreme Court of Ohio has held below that the prohibition against multiple punishments, one of the three protections of the Double Jeopardy Clause, precludes the State of Ohio from continuing its prosecution of a single, multiple count indictment, containing arguably greater and lesser included offenses, because the Defendant-Respondent persuaded the trial court to accept his guilty pleas to the lesser indicted offenses. It reaches that conclusion notwithstanding the State's vehement opposition to the Defendant-Respondent's ploy.

At the outset it should be noted that in a sense the case presents a novel approach to criminal defense tac-

tics. That tactic converts a Constitutional protection into an offensive Constitutional weapon in an obvious attempt to avoid full responsibility and punishment for criminal conduct.

That this tactic is novel is not surprising in light of the fact that historical and legal analysis has consistently adhered to the basic principle that a criminal defendant is to be protected against governmental overreaching and impropriety in its attempts to secure convictions (See Argument I) and has always been the paramount protection of the Double Jeopardy Clause. No such impropriety or overreaching has occurred in this case.

The application of the Double Jeopardy protection against multiple punishments to these facts creates a novel issue for this Court. Previous cases involving multiple punishment questions have dealt mainly with re-trial and re-sentencing of defendants following appellate reversals of convictions. Such was the background of *North Carolina v. Pearce*, 395 U.S. 711 (1969) upon which the majority of the Ohio Supreme Court based its decision below. Its decision is based upon its erroneous interpretation of this Court's language that the guarantee against double jeopardy, inter alia:

> ". . . protects against multiple punishments for the same offense." *Pearce*, 395 U.S. at 718 (footnote and citations omitted).

This Court held that the protection against multiple punishments required that, upon re-conviction for the same offense following reversal of the original conviction, credit for the time served upon that original conviction must be given, *Pearce*, 395 U.S. at 718. This Court also held that the Double Jeopardy Clause of the Constitution did not absolutely bar imposition of a harsher sentence upon re-trial and re-conviction of a defendant following his

successful appeal of his original conviction, *Pearce*, 395 U.S. at 723. Other cases involving multiple punishment questions have dealt with the ability of the trial courts to impose consecutive sentences upon greater and lesser included offenses, in one proceeding, *Whalen v. United States*, 445 U.S. 684 (1980).

The Supreme Court of Ohio goes too far, however, in holding that the protection against multiple punishments precludes the State from seeking, in one criminal proceeding, a conviction and a punishment which does not exceed the maximum allowable for the greater offenses. Such has never been prohibited by this Court's pronouncements dealing with multiple punishments. There can be no question that a State may require a defendant to fully answer for his criminal conduct in a single criminal proceeding. The State may also seek conviction and full punishment for greater offenses where a defendant has an earlier conviction set aside, unless there has been an acquittal of that greater charge at the first trial, *Green v. United States*, 355 U.S. 184 (1957).

The proposition that the Double Jeopardy Clause protects against multiple punishments for the same offense was not new at the time of this Court's holding in *Pearce* and dates at least as far back as this Court's decision in *Ex Parte Lange*, 85 U.S. 163 (1874). In that case the defendant had been indicted for, tried and found guilty of appropriating to his own use mailbags belonging to the Post Office. The punishment provided for by that statute was imprisonment for not more than one year *or* a fine of not less than Ten Dollars nor more than Two Hundred Dollars. The trial court sentenced the defendant to one year in prison *and* a Two Hundred Dollar fine. Four days after being committed to prison the defendant paid his fine in full. The day after his fine was paid he was again

brought before the trial court which issued an order vacating the former judgment, and the defendant was again sentenced to imprisonment from that later date. The defendant then sought and was granted review via Writ of Habeas Corpus.

It must be noted that in the *Lange* case the defendant had been tried and convicted of one specific statutory offense. That offense carried with it a penalty of imprisonment *or* a fine, but not both. Further, the trial court resentenced the defendant to a maximum term of imprisonment five days after he had commenced serving the term on the original judgment and also after his fine had been fully paid. The Court held that such procedure obviously punished the defendant twice for one violation of a single statute.

Procedurally, the case at bar is distinguishable from *Lange*. Here the Defendant-Respondent has been indicted by the Grand Jury for violating four separate and distinct criminal statutes. No trier of fact has been called upon to resolve any issues of fact. Nor does the State seek any more punishment than that which is warranted in this single proceeding. The rule announced in *Lange*, however, cannot be taken to constitute an absolute bar preventing the State from seeking full punishment for criminal conduct in a single criminal proceeding. See *United States v. DiFrancesco*, 449 U.S. 117 (1980).

In *Brown v. Ohio*, 432 U.S. 161 (1977) this Court addressed the issue of the protection against multiple punishments as related to imposing punishments for violations of more than one statute in one proceeding:

> "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed

its legislative authorization by imposing multiple punishments for the same offense." *Brown* at 165.

The Court also went on to add that:

"Where the judge is forbidden to impose *cumulative punishment* for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings." *Brown* at 166 (emphasis added).

It is clear from the Court's language in *Brown* that in any one proceeding the Constitutional protection against multiple punishments bars *only* the imposition of consecutive sentences for violations of statutes that are determined to be the same offense pursuant to the rule of *Blockburger v. United States,* 284 U.S. 299 (1932), See *Gore v. United States,* 357 U.S. 386 (1958) and *Bell v. United States,* 349 U.S. 81 (1955).

The logical result which flows from the preceding statements of this Court is that in any one criminal proceeding a prosecutor may demand full punishment of a defendant for criminal activity which violates two or more statutes with the only constitutional limitation upon punishment being the prevention of imposing consecutive sentences upon convictions for two or more offenses which are the "same" pursuant to *Blockburger.*

Thus, in the case at bar the only Constitutional limitations upon punishment of this Defendant-Respondent for the offenses of Murder and Aggravated Robbery would be grounded upon a determination of whether the greater and lesser offenses are the same pursuant to the "Blockburger" test. Reliance upon such a test, however, does not in any Constitutional sense preclude the State of Ohio from continuing its prosecution of the Defendant-Respondent and seeking the full punishment legislatively au-

thorized for the greater offenses. This conclusion is inescapable in light of the *Jeffers* case.

In *Jeffers* the defendant had been charged in separate indictments for violations of separate and distinct criminal statutes. That defendant opposed the Government's motion to consolidate the indictments. The defendant was first tried, convicted, and sentenced to the maximum penalty of fifteen years in prison and a fine of $25,000 on the lesser offense of conspiracy. The defendant was later tried, convicted, and sentenced to a maximum punishment of life imprisonment and a fine of $100,000 for the greater offense of conducting a continuing criminal enterprise arsing out of the same facts used to convict the defendant of the lesser offense. That sentence was to run consecutively with the earlier sentence. This Court affirmed both convictions and sentences with one important exception.

The Court concluded that the imposition of fines totalling $125,000 violated the prohibition against multiple punishment as the total maximum fine that could be imposed for the greater offense was $100,000. Absent a clear legislative intention to authorize consecutive or cumulative punishments, any fine in excess of the maximum would violate the prohibition of multiple punishments if there were any possibility that the two offenses the defendant had been convicted of were the same for double jeopardy, i.e., "Blockburger" purposes. *Jeffers*, 432 U.S. at 155, 158.

Four Justices of this Court upheld the imposition of the life sentence imposed upon the greater offense notwithstanding the fact that the sentence came at a later time, due to the actions of the defendant. It is clear from *Jeffers* that nothing in the Double Jeopardy Clause prohibits the imposition of any sentence authorized for the greater offense even though it may be imposed at a time

following a conviction and sentence for a lesser included offense, where the separate sentencing is dictated by a course of action elected by the defendant.

The case at bar is, however, on all fours with *Jeffers* with the notable exception that in *Jeffers* the government returned separate indictments of arguably greater and lesser included offenses. This fact did not go unnoticed by Justice Stevens in writing the dissent in that case. *Jeffers*, 432 U.S. at 159 and Footnote 2.

With regard to any multiple punishment problems generated by this case, *Jeffers* would permit a trial and imposition of greater punishment on the greater offenses. *Pearce* and *Lange* do not prohibit greater sentences upon conviction of the greater offenses since the State had the right to try the Defendant-Respondent upon the greater offense in a single criminal proceeding.

> "Since the Government had the right to try petitioner on the § 848 indictment (the greater offense), the court had the power to sentence him to whatever penalty was authorized by that statute." *Jeffers*, 432 U.S. at 157 (parenthesis added).

It seems inescapable that a defendant's right to be protected against multiple punishments is not invoked where the defendant's actions necessitate separate sentencing and there is no imposition of cumulative or consecutive sentences for both offenses. Such is the case when during the normal course of events a defendant is tried in one trial of greater and lesser included offenses and a jury renders guilty verdicts upon both charges. The convictions are then merged even though there have been separate pronouncements of guilty by the trier of fact.

Further, any adverse collateral consequences of the convictions for the lesser offenses in the case at bar may

be avoided by the Defendant-Respondent, by resort to Section 2953.21 of the Ohio Revised Code, Petition to vacate or set aside sentence (See Petition for Writ of Certiorari, Appendix at A28).

The Supreme Court of Ohio recognized that cumulative punishments for greater and lesser offenses are prohibited. Cumulative sentences are by definition the same as consecutive sentences and are those sentences which are to take effect after another sentence has been served, BLACK'S LAW DICTIONARY, 276, 343 (5th ed. 1979). In the case at bar, convictions and sentences which encompass the prior sentences for the lesser indicted offenses would not necessarily involve *cumulative* or multiple punishments in any constitutional sense. It also follows that if cumulative sentences cannot be imposed for these offenses, *Pearce* requires no more than that this Defendant-Respondent be given credit for all time served on the lesser offenses pursuant to either Section 2967.191 of the Ohio Revised Code, Reduction of minimum and maximum sentence (Appendix, Petition for Writ of Certiorari at p. A29), or the judicial order of the trial court. This all assumes, of course, that the single prosecution of the Defendant-Respondent culminates with convictions for the greater offenses.

It is clear then that none of the Constitutionally guaranteed protections of the Fifth Amendment prohibit the State of Ohio from continuing its prosecution of the Defendant-Respondent through trial upon the greater offenses of Murder and Aggravated Robbery. Thus, the Ohio Supreme Court erred in concluding that the Defendant-Respondent's election to plead guilty to the lesser offenses, over the State of Ohio's objections, prohibited continuation of his prosecution to trial. It should suffice to say that the Double Jeopardy protection protects a defendant from being twice punished for the same offense, and that a de-

fendant charged in a multiple count indictment, who is convicted and sentenced to any term not exceeding the maximum for the greater offense, is not being punished twice, where the sentence for the greater offense encompasses the sentence for the lesser by crediting time served, and particularly where the State has persistently attempted to accomplish prosecution in one criminal proceeding. If this Court were to affirm the "Johnson Gambit" the result would be a perversion of the Double Jeopardy provision, transforming it from a protection, from overreaching by the government, to a weapon, utilized by defendants to avoid vigorous and proper prosecution.

III. Murder as Defined in Ohio Revised Code Section 2903.02 and Involuntary Manslaughter as Defined in Ohio Revised Code Section 2903.04 Are Not the Same Offenses for Purposes of Double Jeopardy Protections Where Both Statutes Contain Different Elements and Conviction for Either Offense Would Require Proof of Facts Not Necessary to Sustain Conviction on the Other.

In addition to the previous arguments, this Court must also address the issue of whether Involuntary Manslaughter, in violation of R.C. 2903.04 is a lesser included offense of Murder, a violation of R.C. 2903.02. Murder requires that the accused purposely cause the death of another. Involuntary Manslaughter requires that the accused cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or

only one is whether each provision requires proof of an additional fact which the other does not. *Blockburger v. United States*, 284 U.S. 299 (1932). If two crimes are factually distinguishable, the test found in *Blockburger* is satisfied and there is no violation of the right to be free from double jeopardy despite substantial overlap in the elements which must be proven to constitute each of the charged offenses. *Iannelli v. United States*, 420 U.S. 770 (1975). It is a well established principle that a single transaction may support convictions for separate offenses proscribed by different statutes. *Missouri v. Hunter*, 74 L. Ed. 2d 535 (1983); *Albernaz v. United States*, 450 U.S. 333 (1981).

The Involuntary Manslaughter charge in the present case requires that a death be caused as a proximate result of the commission of a misdemeanor. It has never been established which underlying misdemeanor was the cause of death. The Defendant-Respondent may have committed a misdemeanor for which no mental element was required. None of the lower courts have addressed whether the misdemeanor committed involved any mental intent, and without any mental intent required for the misdemeanor, no mental intent is required for the Involuntary Manslaughter conviction. Obviously, the State of Ohio would not be obligated to prove purpose. To prove Involuntary Manslaughter in the present case the prosecution must show a death proximately caused by the commission of a misdemeanor, with or without a mental intent. To prove murder, a "purposeful" intent is required whereas the proof of a separate misdemeanor is not a requisite element. The Involuntary Manslaughter and Murder charges in this case each requires proof of an additional

fact which the other does not. Since separate elements are required, the offenses are two separate offenses pursuant to *Blockburger*.

If the so-called greater offense can be proven without the necessity of including the lesser, or if the lesser includes an element not necessarily to be found in the so-called greater, then they are not of necessity included offenses and are not the same offense for purposes of the protection offered by the Fifth Amendment. *Brown v. Ohio,* 432 U.S. 161 (1977).

The Ohio General Assembly's intent in enacting the multiple count statute, Ohio Revised Code Section 2941.25 (Brief Appendix A5-A6), was to allow for the conviction of only one crime where an individual's immediate motive involved the commission of one offense, but in the course of committing that crime he must, a priori, have committed another offense. *State v. Logan,* 60 Ohio St. 2d 126, 397 N.E.2d 1345 (1979). As previously pointed out the commission of a Murder does not, a priori, involve the commission of Misdemeanor-Manslaughter, although it may on occasion. Conversely, the commission of Misdemeanor-Manslaughter does not, a priori, involve the commission of Murder, although it may on occasion also involve some of the elements of the crime of Murder. Therefore, under the Ohio Supreme Court's interpretation in *Logan* of the legislative intent behind the multiple count statute, Murder and Involuntary Manslaughter are separate offenses.

Ohio Revised Code Section 2941.25's application is determined by the statutory construction enunciated in *Blockburger* for identifying multiple punishments for the same offense. The Supreme Court of Ohio repeated the *Blockburger* Standards when it ruled:

> ". . . [I]n order for two crimes to constitute allied offenses of similar import, there must be a recognized similarity between the elements of the crimes committed. The offenses and their elements must correspond to such a degree that the commission of the one offense will result in the commission of the other." *State v. Logan*, 60 Ohio St. 2d 126, 128, 397 N.E.2d 1345, 1348 (1979).

The analysis of the Ohio Supreme Court sub judice consisted of a mechanical application of the *Blockburger* test which resulted in an erroneous ruling. This same application, if correct, would have caused a different result in *Illinois v. Vitale*, 447 U.S. 410 (1980). There, this Court applied *Blockburger* and held that where a defendant, whose automobile struck and killed two children, was convicted for failing to reduce speed to avoid the accident, the double jeopardy clause did not prohibit a further prosecution for involuntary manslaughter. This Court ruled:

> "The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution." *Illinois v. Vitale*, 447 U.S. at 419.

In *Vitale*, 447 U.S. at 419, the Illinois Supreme Court had mechanically applied *Blockburger* but failed to analyze whether or not it was possible to prove manslaughter by automobile without also proving a careless failure to reduce speed. In the present case the Ohio Supreme Court has made the same mistake in its analysis of the relationship between Murder and Involuntary Manslaughter. The Ohio Supreme Court failed to consider whether or not

Murder could be proved without also proving Involuntary Manslaughter. It can, and Involuntary Manslaughter can be proved without proving the element of purpose required for Murder. In the present case the two offenses are distinguishable, since Murder does not always entail proof of a Misdemeanor which would be required to show Involuntary Manslaughter, and Involuntary Manslaughter does not always require the element of the mental intent required for Murder.

From the above it is clear that the Supreme Court of Ohio misinterpreted *Blockburger* in its Opinion at page eight when it stated that:

> "Involuntary manslaughter involves a lesser mental state as it is a killing which proximately results from the defendant's committing or attempting to commit another offense. It is manifestly obvious that these two states are mutually exclusive and that in any given killing the offender may be possessed of only one. Under the *Blockburger* analysis, the possibility of proving a fact for one offense which is not required under the other is excluded."

The Court failed to recognize that there may be no mental state required to prove misdemeanor-manslaughter. Certain misdemeanors require no mental state, yet an involuntary manslaughter conviction may result. Discharging of a firearm within city limits is one example of a misdemeanor for which no mental state is required. Mentor-on-the-Lake, Ohio, Codified Ordinance §672.12 (Brief Appendix A6).

Since the commission of a misdemeanor does not always constitute a necessary element of murder as a matter

of Ohio law, and neither "purposely" nor any other mental state is always a necessary element of Involuntary Manslaughter as a matter of Ohio law, the conviction of one does not bar prosecution for the other.

CONCLUSION

The decision of the Ohio Supreme Court in the case at bar is an erroneous application of the Double Jeopardy Clause. It is erroneous on several grounds.

The Ohio Supreme Court misunderstood and misapplied the *Blockburger* standard by ruling that Involuntary Manslaughter is a lesser included offense of Murder. The lower Court ruled, in essence, that since the Defendant-Respondent could have had only one purpose or mental intent in shooting Thomas Hill, then the mental intent required for the commission of Involuntary Manslaughter was the same as that required for Murder and the elements of the two offenses corresponded to such a degree that the *Blockburger* test was satisfied. This analysis failed to consider that the mental intent element of the Involuntary Manslaughter depends upon the mental intent element of the underlying misdemeanor which proximately caused the death of the victim. In Ohio, there are misdemeanors which do not require the proof of any mental intent. The two offenses, therefore, require proof of separate and distinct facts. Obviously, on occasion, the facts of an individual case may dictate that proving Murder may also require that the State of Ohio prove Involuntary Manslaughter, but that is not sufficient to invoke the Double Jeopardy protections. Pursuant to

Blockburger, before Double Jeopardy arises the proof of one offense must, a priori, involve the proof of the other.

The Ohio Supreme Court was further in error by ruling that the multiple punishment protections of the Double Jeopardy Clause prohibited further prosecution in this case. When all of the charges are brought in a single proceeding and cumulative and multiple sentences can be avoided pursuant to judicial order or State Statute, then Double Jeopardy does not prohibit continued prosecution.

Finally, the Ohio Supreme Court was in error by applying a rigid standard to the Double Jeopardy provisions. This clause of the Fifth Amendment was intended to prevent the Government from imposing oppressive and unfair practices upon defendants in criminal proceedings. The Government should not be permitted to make "repeated attempts" to convict an individual, but surely where the State acts in a lawful manner it should not be prevented from making at least one attempt to convict the Defendant-Respondent. This is especially so where the accused has elected to bifurcate a single proceeding and persuaded the trial court to honor that election, despite the State's objections.

Clearly, even following a conviction, there are exceptions to the protection of the Double Jeopardy Clause. The case at bar is such an exception. Where the Defendant-Respondent has had all charges brought against him in a single proceeding, and in an effort to avoid the full prosecution of his crimes he persuades the trial court to accept his plea to the crimes of his choice, then Double Jeopardy does not bar further prosecution of the greater charges.

For all the reasons established above, we ask this Court to reverse the decision of the Ohio Supreme Court and remand this case for further appropriate proceedings.

Respectfully submitted,

JOHN E. SHOOP, *Prosecuting Attorney of Lake County, Ohio*
Counsel of Record
JUDSON J. HAWKINS
ROBERT W. LAFORCE
JOSEPH M. GURLEY
FRANCIS P. WEISS
Assistant Prosecuting Attorneys
47 North Park Place
P.O. Box 490
Painesville, Ohio 44077
(216) 357-2683
Attorneys for Petitioner

APPENDIX

OHIO RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas, Rights Upon Plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or his attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court shall, except as provided in subsections (C)(3) and (4), proceed with sentencing under Rule 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being

readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Rule 44(B) and (C) apply to this subdivision.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

Amended, eff 7-1-76; 7-1-80

OHIO REVISED CODE

§ 2939.06 Oath to grand jurors. (GC § 13436-3)

When a grand jury is impaneled the court of common pleas shall appoint one of the members thereof as foreman, and shall administer, or cause to be administered, to said jurors an oath in the following words:

"You and each of you do solemnly swear that you will diligently inquire, and true presentment make of all such matters and things as shall be given you in charge or otherwise come to your knowledge, touching the present service; the counsel of the state, your own, and your fellows, you shall keep secret unless called on in a court of justice to make disclosures; and you shall present no person through malice, hatred, or ill will, nor shall you leave any person unpresented through fear, favor, or affection, or for any reward or hope thereof, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding.["]

§ 2939.08 Duty of grand jury. (GC § 13436-5)

After the charge of the court of common pleas, the grand jury shall retire with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county.

§ 2941.25 Multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

CONSTITUTION OF OHIO

Article I, Section 10

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing

to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and the jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

MENTOR-ON-THE-LAKE ORDINANCE

672.12 Pointing and Discharging Firearms and Other Weapons.

(a) Except as provided in subsections (c) and (d) hereof, no person shall discharge any air gun, rifle, shotgun, revolver, pistol or other firearm, or make use of any sling or arrow, within the corporate limits of the Municipality.

(b) No person shall, intentionally and with malice, point or aim a firearm at or toward another or discharge a firearm so pointed or aimed.

(c) This section does not extend to cases in which firearms, slings or arrows are used in self-defense, in the discharge of official duty or in justifiable homicide.

(d) This section does not extend to cases in which BB guns and other air guns, or slings or arrows, are used in the confines of dwellings, provided such use is under adult supervision and is approved by the Chief of Police.

(e) Whoever violates any of the provisions of this section is guilty of a misdemeanor of the fourth degree. Punishment shall be as provided in Section 698.02.

(THIS PAGE INTENTIONALLY LEFT BLANK)